10-1487-cv(L)

10-1488-cv, 10-1493-cv, 10-1507-cv, 10-1510-cv, 10-1524-cv, 10-1529-cv, 10-1545-cv, 10-1603-cv, 10-1629-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-1487-cv(L), 10-1488-cv, 10-1493-cv, 10-1507-cv, 10-1510-cv, 10-1524-cv, 10-1529-cv, 10-1545-cv, 10-1603-cv, 10-1629-cv

NML CAPITAL, LTD., EM LTD.,

Plaintiffs-Appellees,

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

TONY WEST,
Assistant Attorney General

DOUGLAS N. LETTER,
SHARON SWINGLE,
Attorneys, Appellate Staff, Civil Division
Department of Justice

GEORGE W. MADISON,
General Counsel,
Department of the Treasury

HAROLD HONGJU KOH,
Legal Adviser,
Department of State

PREET BHARARA,
United States Attorney for the Southern District of New York,
Attorney for the United States of America as Amicus Curiae.
86 Chambers Street, 3rd Floor
New York, New York 10007
(212) 637-2716

JOHN D. CLOPPER,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys,
Of Counsel.

—v.—

BANCO CENTRAL DE LA REPÚBLICA ARGENTINA,

Interested Party-Appellant,

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases:

PAGE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-1487-cv, 10-1488-cv, 10-1493-cv, 10-1507-cv, 10-1510-cv, 10-1524-cv, 10-1529-cv, 10-1545-cv, 10-1603-cv, 10-1629-cv

---

NML CAPITAL, LTD., EM LTD.,

Plaintiffs-Appellees,

—v.—

BANCO CENTRAL DE LA REPÚBLICA ARGENTINA,

Interested Party-Appellant,

THE REPUBLIC OF ARGENTINA,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

Interest of the United States

By invitation of this Court and pursuant to 28 U.S.C. § 517 and Rule 29(a) of the Federal Rules of Appellate Procedure, the United States respectfully submits this brief as amicus curiae.

This Court invited the United States to offer its view on two questions: (1) whether the Banco Central de la

República Argentina ("BCRA") is the "alter ego" of the Republic of Argentina under *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), and (2) if so, whether the BCRA's assets at the Federal Reserve Bank of New York ("FRBNY") are immune from post-judgment attachment under § 1611(b)(1) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1611(b)(1).

The United States participates in this case as amicus curiae in support of reversal because the United States has a substantial interest in the proper disposition of the questions presented in this appeal and posed in the Court's order. While the United States does not seek to condone or excuse a foreign state's failure to comply with the judgment of a U.S. court imposing liability on the state, the district court's order inappropriately circumscribes the immunity afforded to the property of foreign central banks. Many foreign central banks choose to hold their reserves in dollar-denominated assets in accounts in the United States—frequently in accounts at the FRBNY. Foreign central banks invest their reserves in the United States because of the stability of the U.S. dollar, the unparalleled depth and liquidity of our financial markets, and the reliability of our political and judicial institutions. Equally critical has been the assurance long provided by United States law that central banking funds held in this country are immune from attachment, save for very narrow exceptions. If this traditional immunity were substantially weakened, foreign central banks might be led to withdraw their reserves from the United States and place them in other countries. *See generally* Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United*

States, 1982 U. Ill. L. Rev. 265, 265-71 (1982). Any significant withdrawal of these reserves could have an immediate and adverse impact on the U.S. economy and the global financial system.

The United States also has an interest in promoting reciprocal international principles of central bank immunity to ensure that U.S. reserves held by the Federal Reserve abroad receive adequate protection. And the United States has an interest in protecting foreign central banks engaged in central banking activities from interference by unwarranted litigation in U.S. courts.

As explained below, the FRBNY funds are immune from attachment under § 1611(b)(1) regardless of whether the BCRA is the "alter ego" of the Republic. The plain language of § 1611(b)(1), as well as the history and structure of the relevant provisions of the FSIA, all demonstrate that central bank property is immune from attachment without regard to whether the central bank is independent from its parent foreign government. Such immunity should be afforded to any property held by a central bank used for central banking activities. Adopting the cramped view of central bank immunity that the plaintiffs advocate in this appeal would contravene Congress's intent to protect all foreign state property used for central banking functions from attachment or execution, and could cause harm to the interests of the United States. Accordingly, the district court's order should be reversed because the district court erred with respect to Question Number 2.

Although it is not necessary for the Court to reach Question Number 1 in order to resolve this appeal, the district court's analysis of the "alter ego" issue was also

flawed. Specifically, the district court erred in relying on the BCRA's alleged involvement in repaying the Republic's debts to the IMF as evidence that the BCRA is the alter ego of the Republic. Should the Court choose to reach this issue on appeal, the United States urges the Court to clarify that the BCRA's involvement in repaying the IMF does not support disregarding the BCRA's separate juridical status.

ARGUMENT

POINT I

SECTION 1611(b)(1) BARS ATTACHMENT OF THE FRBNY FUNDS

A. Section 1611(b)(1) Applies to the Property of a Foreign State

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*, establishes a comprehensive and exclusive scheme for obtaining and enforcing judgments against a foreign state in civil cases in U.S. courts. *See generally Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). In relevant part, the Act establishes a default presumption that foreign state property is immune from attachment, execution, or arrest, 28 U.S.C. § 1609, and sets out limited exceptions to immunity from execution in § 1610. Even where foreign state property would otherwise be subject to execution or attachment under § 1610, furthermore, § 1611(b)(1) provides that "the property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of a foreign central bank or monetary authority held for its own

account." The scope of immunity provided by § 1611(b)(1) lies at the heart of this appeal.

The district court held that § 1611(b)(1) did not confer immunity on the central bank funds that are sought to be executed against in this litigation based on its conclusion that, under *Bancec*, the BCRA is the alter ego of the Republic. Having held that the BCRA is the alter ego of the Republic, the district court reasoned, "it would be entirely anomalous to hold that the funds belonged to BCRA and were 'held for its own account' within the meaning of § 1611." (SPA 69).* The district court's holding and rationale are erroneous. Regardless of whether the district court was correct in holding that the BCRA is the alter ego of the Republic of Argentina, it does not follow that § 1611(b)(1)'s grant of immunity does not apply. The plain language of § 1611(b)(1), as well as its history and structure, make clear that foreign state property used for central banking activities is immune from attachment or execution without regard to whether the central bank or monetary authority is independent from its parent foreign state.

First and foremost, the plain language of § 1611(b)(1) makes clear that immune property can be *both* the property of a foreign state and *also* the property of its central bank or monetary authority. Section 1611(b)(1) provides that, "[n]otwithstanding the provisions of section 1610 of this chapter, *the property of a foreign state* shall be immune from attachment and from execution if—(1) *the property is that of a foreign*

---

* Citations to "JA __" refer to the Joint Appendix filed by the parties and "SPA __" to the Special Appendix filed by the BCRA.

central bank or monetary authority held for its own account . . . ." (emphasis added). The statute thus refers to immune property as both that "of a foreign state" (which, pursuant to the definition of "foreign state" contained in § 1603(a), includes the parent foreign state, a political subdivision of the parent foreign state, or an "agency or instrumentality" of the foreign state) and that "of a foreign central bank." In light of this plain language, it would be wholly incongruous to hold that immunity cannot apply simply because the central bank has been determined to be the alter ego of the foreign state.

Plaintiffs, relying on the fact that the definition of "foreign state" includes state agencies or instrumentalities, argue that the reference to "property of a foreign state" in § 1611(b)(1) encompasses only the property of an independent central bank. Pls.' Br. at 68-69, 74 n. 21. Were that the case, however, Congress could have simply provided that "the property of a foreign central bank or monetary authority held for its own account" is immune from execution, without the need for the language in the introductory preamble regarding "the property of a foreign state." *See Doe v. Chao*, 540 U.S. 614, 630-631 (2004) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks and citation omitted)). Instead, Congress provided that the property can be that of a "foreign state," which, consistent with the FSIA's definitional section (§ 1603(a)), can include the parent foreign government as well as agencies or instrumentalities. Furthermore, if Congress had intended to limit § 1611(b)(1) to independent central

banks, one would have expected the introductory language of the subsection—"Notwithstanding the provisions of section 1610 of this chapter"—to refer only to § 1610(b), which provides for execution or attachment of the property of state agencies and instrumentalities, rather than to § 1610 as a whole. Under the plain language, therefore, § 1611(b)(1) immunizes central bank property without regard to whether it is owned by the foreign state itself or is instead owned exclusively by an independent central bank or monetary authority.

Section 1611(b)(1)'s pairing of immunity for property of a "monetary authority" and property of a central bank further supports the conclusion that a foreign state and its central bank need not be independent of each other for immunity under § 1611(b)(1) to apply. At the time of the FSIA's passage, it was not unusual for monetary functions to be performed by departments of the central government, rather than by independent agencies or instrumentalities. Similarly, at the time the FSIA was enacted, it was commonplace for central banks to be subject to substantial control by foreign governments. *See, e.g.*, A. Cukierman, *Central Bank Independence and Monetary Policymaking Institutions —Past, Present and Future*, 24 Eur. J. Pol. & Econ. 722, 722 (2008) ("Twenty years ago and earlier, most central banks in the world functioned as departments of ministries of finance."). This dual focus on monetary authorities and central banks suggests that Congress intended for immunity to apply based on the functions performed by the entity holding the property, rather than on the independence *vel non* of the entity. Plaintiffs' argument is thus at odds with the congressional intent apparent from the face of § 1611(b)(1): there is no

reason Congress would have intended to confer immunity on foreign state property held by a department of the state and subject to complete executive control, but not on foreign state property held by a nominally independent entity subject to the same degree of direction and control.

The FSIA's legislative history also supports the conclusion that immunity under § 1611(b)(1) is unrelated to the degree of independence of the central bank or monetary authority. The House Report, in discussing § 1611(b)(1), states that the purpose of the provision is to protect "funds of a foreign central bank . . . deposited in the United States," because "execution against the *reserves of a foreign state* could cause significant foreign relations problems." H.R. Rep. No. 94-1487, at 25 (1976) (emphasis added), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (quoted in *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 473 (2d Cir. 2007)). Although foreign reserves are frequently under the direct control of central banks, they are also, in a general sense, the property of the foreign state. Congress recognized this in the House Report by speaking of foreign reserves as the property "of a foreign state" as well as "funds of a foreign central bank." By referring to the property of a foreign state and the property of a central bank interchangeably, Congress indicated its understanding that central bank property could be viewed as the property of a foreign state, and nonetheless be immune from attachment.

That understanding is consistent with historical practice as well. Notably, shortly before the enactment of the FSIA, the State Department recognized an immunity claim for foreign reserve assets that were

under the direction and control of the foreign state. *See* 1973 Digest of U.S. Int'l Law 227-28 (describing July 24, 1973, letter from Department of State Acting Legal Adviser Charles N. Brower to Department of Justice, requesting the filing of a suggestion of immunity in *Battery Steamship Corp. v. Republic of Viet-Nam*, No. C-72-1440 (N.D. Cal.)). In *Battery Steamship*, the plaintiff sought to attach foreign exchange reserves of the Republic of Vietnam, which were periodically used to pay "debts of the Republic of Viet-Nam to other governments," as well as for other purposes. *Id.* at 227. The State Department's Acting Legal Adviser suggested that the funds would be protected from execution under a draft bill that was substantially identical to the provision ultimately enacted by Congress and codified at 28 U.S.C. § 1611(b)(1), and expressed concern about the negative consequences if foreign states or their monetary authorities were to withdraw their official reserves from U.S. banks. *Id.* at 228-29. This incident lends support to the conclusion that the FSIA sought to immunize the property of foreign states used for central banking functions such as holding foreign exchange reserves, without regard to whether the property was subject to the direction and control of the foreign state.

Plaintiffs suggest that recognizing immunity for central bank assets subject to direction or control by a foreign state would discourage the development of independent central banks. Pls.' Br. at 2-3, 22. But those were not the concerns animating Congress in enacting § 1611(b)(1). Congress wanted to ensure that execution could not be levied against funds used or held in connection with central banking activities, which might "discourage[]" foreign governments from depositing their foreign funds in the United States. *See EM*,

473 F.3d at 473; H.R. Rep. No. 94-1487, at 25, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630. If the immunity afforded to central bank property were weakened, foreign governments might withdraw reserves from the United States, which could have an immediate and adverse impact on the U.S. economy and global financial system. Reduction of these reserves could result in a substantial deterioration in the United States' balance of payments. And because foreign reserves are frequently invested in U.S. government securities, withdrawal of those reserves could cause U.S. interest rates to rise as government securities were sold. Moreover, any sharp movement of central bank reserves would likely cause significant currency flow away from the U.S. dollar and into other currencies, which could have an unsettling effect on foreign exchange markets. In addition, Congress wanted to avoid the adverse foreign-relations consequences that might arise from attaching sovereign funds. These are the concerns underlying § 1611(b)(1)—not central bank independence—and they are implicated whenever a plaintiff tries to execute on central bank funds in the United States that are being used for a sovereign purpose, regardless of whether the central bank is independent of the parent government or the funds might be considered the foreign state's property.

For these reasons, § 1611(b)(1) applies without regard to whether the BCRA's funds are also deemed in whole or in part to be the funds of the Republic, and regardless of whether the BCRA is independent of the Republic. The district court erred in holding otherwise.

B. Immunity Under § 1611(b)(1) Should Apply to Funds Used or Held in Connection with Central Banking Activities

As noted, the district court reasoned that, once the BCRA was found to be the "alter ego" of the Republic of Argentina, the BCRA's account at the FRBNY necessarily was not "held for its own account." (SPA 69). That analysis, however, is in error. Congress intended for central bank property held in the United States to be immune whenever it is used for central banking functions. Property held in the name of a central bank should be presumed to meet § 1611(b)(1)'s "held for its own account" requirement, and a plaintiff should be required to allege specific facts giving rise to a reasonable inference that the funds are not being used for central banking functions before a district court permits discovery to verify those factual allegations or execution against those funds in satisfaction of a judgment. The record here is clear that the plaintiffs cannot demonstrate that the funds held at the FRBNY are not being used for central banking activities.

Section 1611(b)(1) was enacted to permit central banks and monetary authorities to engage in core sovereign banking and monetary activities without fear that the funds used for those activities will be attached by judgment creditors of the foreign state. *See* H.R. Rep. No. 94-1487, at 25, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (explaining purpose of § 1611(b)(1) is to protect central bank funds "used or held in connection with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states"). Central banking activities include, among other things, issu-

ance of a country's currency; holding of the country's currency reserves or precious metal reserves; maintenance of domestic reserves of depository institutions; regulation of depository institutions; engaging in open market operations; setting monetary policy; settlement of clearing balances in the payments system; administration of credit controls; serving as a banker's bank to private sector banks and as lender of last resort; and providing general banking services to the parent government. *See* P. Lee, *Central Banks and Sovereign Immunity*, 41 Colum. J. Transnat'l L. 327, 352-53 (2003). Central banks may also be authorized to provide banking services to private-sector parties. *Id.* at 353-54.

In addition, the purpose of foreign sovereign immunity is, in part, to shield foreign states and their instrumentalities from the burdens of litigation. As this Court has acknowledged, the protections of the FSIA would be inappropriately diminished if a foreign central bank was routinely required to submit to extensive discovery regarding the uses to which it puts its funds. *See EM*, 473 F.3d at 486 (citing *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) ("FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation.")). For that reason, "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination." *EM*, 473 F.3d at 486; *accord Af-Cap Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1096 (9th Cir. 2007).

Accordingly, a plaintiff seeking to execute against central bank property should be required to make a threshold showing of non-immunity before a court

requires the central bank to provide discovery regarding its activities. In particular, where funds are held in an account in the name of a central bank, the funds should be presumed to be immune under § 1611(b)(1). Before a court allows a plaintiff to rebut that presumption (or involve the central bank in potentially burdensome discovery), a plaintiff should be required to allege specific facts giving rise to a reasonable inference that the funds are not being used for central banking functions. *See* H.R. Rep. No. 94-1487, at 25, *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6630 (distinguishing between funds used for central banking activities and funds "used *solely* to finance the commercial activities of other entities or of foreign states" (emphasis added)).

In this case, the record establishes that the funds sought to be attached are immune under § 1611(b)(1). As a threshold matter, it is undisputed that the funds are held in an account in the name of the BCRA. As the FRBNY has explained, "[u]nder fundamental banking law principles, a positive balance in a bank account reflects a debt from the bank to the depositor." FRBNY Amicus Br. at 14-15. Further, "[b]ecause the account in question here is held solely in the BCRA's name, the BCRA is the only party to whom the FRBNY owes a debt with respect to any positive balance in the account" and "is the only party from whom the FRBNY will accept instructions with respect to the account." *Id.* at 15. Thus, the funds that plaintiffs seek to attach are the property of a central bank for purposes of § 1611(b)(1).

The extensive factual record demonstrates that the presumption that such property is "held for [a central bank's] own account" cannot be rebutted in this case—

the uses to which the FRBNY funds were put are central banking activities and therefore fall squarely within the zone of activities that Congress intended to protect. At the time the plaintiffs sought an attachment order against the BCRA's Federal Reserve account, in December 2005, the balance in the account was approximately $105 million. (SPA 68). The district court found that the balance in the account arose from four sets of transactions: (1) $31 million had been transferred into the Federal Reserve account in order to pay Argentine banks that sought to reduce the amount of their U.S. dollar reserves; (2) $32 million had been transferred into the account because certain Argentine banks were increasing their U.S. dollar reserves; (3) the BCRA had purchased approximately $35 million in U.S. dollars throughout the day in order to control its currency; and (4) $1.2 million had been deposited pursuant to a regulatory exchange rule that the BCRA imposed on Argentine exporters. (SPA 68; JA-VII:334-35, 346-52). These are central banking activities, and, accordingly, the FRBNY funds meet the "held for its own account" requirement of § 1611(b)(1). *See Weston Compagnie de Finance et D'Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993); Rosa Maria Lastra, *Central Banking and Banking Regulation* 272-74 (1996); Patrikis, 1982 U. Ill. L. Rev. at 277-78; M.H. deKock, *Central Banking* 34-38 (1974).*

---

* The plaintiffs do not contend that there has been an applicable waiver of immunity from execution or attachment under § 1611(b)(1). Section 1611(b)(1) provides that the property of a foreign central bank or monetary authority held for its own account is immune from execution or attachment "unless such bank or

Because the record establishes that the funds held in an account in the BCRA's name were used for central banking activities, the funds are immune from attachment under § 1611(b)(1).

Finally, the plaintiffs err in suggesting that the BCRA's active role in repaying the IMF, including its transfer of some of its excess reserves to repay the Republic's debt, was an appropriate basis to hold § 1611(b)(1) inapplicable. *See, e.g.*, Pls.' Br. at 1, 7, 11-15. As an initial matter, this Court has already acknowledged that the funds sought to be executed against were not used to repay the IMF. *EM*, 473 F.3d at 484-85 (holding that FRBNY funds were not used for repayment of the IMF, and therefore not "used for" commercial activities within meaning of § 1610(a) and (d)). Before a district court may order execution under the FSIA, the court must make a determination that the use of the property at that time renders it subject to

---

authority, or its parent foreign government, has *explicitly* waived its immunity . . ." (emphasis added); *cf.* 28 U.S.C. § 1610(a)(1) (providing for waiver of immunity from execution "by implication"). By adding a separate provision for waiver of immunity from attachment for property held by a central bank, and by requiring that the waiver be "explicit," Congress reinforced the special concerns raised by attempts to attach central bank property. As this Court previously noted in *EM*, "although the Republic's waiver of immunity from attachment is worded broadly, it does not appear to clearly and unambiguously waive BCRA's immunity from attachment, as it must do in order to be effective." *EM*, 473 F.3d at 485 n. 22.

execution under the FSIA. *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 130 (2d Cir. 2009). Accordingly, the IMF debt repayment is not relevant to the inquiry of whether § 1611(b)(1) applies.

In any event, repayment of IMF debt is within the scope of typical central banking activities. The IMF is a multi-national sovereign lender of last resort, and central banks routinely pay IMF debts of their foreign state. *EM*, 473 F.3d at 485 n.22 ("[C]entral banks regularly execute transactions with the IMF on behalf of their parent governments; IMF members are required to designate a fiscal agent for financial transactions with the IMF, and the vast majority of members designate their respective central banks."). Furthermore, the United States and the international community rely on the IMF as a key source of support for foreign states facing financial crises and, for the IMF to play its lending role effectively, it must be able to expect timely and complete payments from its borrowers. Central banks frequently play an important role in their parent governments' relationships with the IMF, and it would be highly problematic—and contrary to the interests of the United States—for a U.S. court to rely on a foreign central bank's repayment of debt to the IMF as a basis for finding that the foreign central bank's property is not entitled to immunity under the FSIA. Accordingly, even if the FRBNY funds had been used to pay the IMF, that use would still be a central banking activity and would not remove the funds from the protections of § 1611(b)(1).*

---

* Because § 1611(b)(1) applies even if a central bank's activities are commercial in nature, it is not

POINT II

THE DISTRICT COURT'S ALTER EGO ANALYSIS WAS FLAWED

Because § 1611(b)(1) bars the attachment of the BCRA's funds held at the FRBNY, it is not necessary for the Court to reach the question of whether the

---

necessary for the Court to address the correctness of the district court's reasoning that, because the BCRA's funds were held in "a bank account with deposits and withdrawals, with the ability to earn a certain amount of income on balances," they were "used for a commercial activity" within the meaning of § 1610(a). (SPA 68). However, the United States notes its disagreement with that rationale—which would reach a broad range of foreign state property that is being used in support of a sovereign activity—because it is inconsistent with the FSIA's fundamental distinction between assets used in connection with commercial activities and assets used in connection with sovereign functions. *Cf. Corzo v. Banco Central de Reserva del Peru*, 243 F.3d 519, 524 (9th Cir. 2001) (rejecting argument that a claim seeking to attach U.S. assets owned by a foreign monetary authority is "based upon a commercial activity carried on in the United States by a foreign sovereign"); *FG Hemisphere Assocs. Inc. v. Democratic Republic of Congo*, 447 F.3d 835, 843 (D.C. Cir. 2006) (rejecting argument of judgment creditor that real properties owned by a foreign state and previously used for diplomatic purposes were "used for a commercial activity" because they were held as investments in an appreciating real estate market).

district court was correct in finding that the BCRA is an alter ego of the Republic. However, certain aspects of the district court's analysis were incorrect.

In particular, the district court erred in relying on the BCRA's involvement in the Republic's payment to the IMF as evidence in support of its alter ego finding. In *Bancec*, the Supreme Court held that, for purposes of substantive liability, the separate juridical status of a foreign agency or instrumentality should be respected, except in certain circumstances:

> [W]here a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other. *See NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 401-04 (1960). In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1929). *See Pepper v. Litton*, 308 U.S. 295, 310 (1939).

Bancec, 462 U.S. at 629; *accord Letelier v. Republic of Chile*, 748 F.2d 790, 794 (2d Cir. 1984) ("[A] foreign state instrumentality is answerable just as its sovereign parent would be if the foreign state has abused the

corporate form, or where recognizing the instrumentality's separate status works a fraud or an injustice.").*

The district court placed great weight on the BCRA's involvement in the payment of the Republic's debt to

---

* Although the Court need not decide whether, as plaintiffs argue, "the inescapable consequence of a finding under *Bancec* that an instrumentality's juridical separateness is to be disregarded is that the property held in the name of the instrumentality is the property of the parent entity" (Pls.' Br. at 64-65), *Bancec* did not involve attachability under the FSIA or any issue of ownership of an instrumentality's property. Rather, in *Bancec,* the issue of the juridical separateness of a foreign state's instrumentality arose in the context of substantive liability: Bancec had sued Citibank on a letter of credit and Citibank brought a counterclaim, asserting a right to set off the value of certain of its assets that had been seized and nationalized by the Cuban government. 462 U.S. at 613. Accordingly, the only question before the Court was whether an instrumentality of a foreign state could be held substantively liable for the actions undertaken by its parent government. The Court held that there is a presumption that an agency or instrumentality is to be treated as a separate juridical entity that is not substantively liable for the acts of its parent government but that this presumption may be overcome and the instrumentality held liable "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created" or where respecting the separate status of an entity "would work fraud or injustice." 462 U.S. at 629.

the IMF, and appears to have concluded that the Republic's payment to the IMF in preference to its other creditors was unjust or inequitable. For example, the district court stated that the BCRA's involvement in the payment of the Republic's debt to the IMF was of "great significance" to its alter ego determination, and emphasized that the IMF loan was the indebtedness of the Republic, not the indebtedness of the BCRA. (SPA 26, 28). The district court also noted the BCRA's activities in 2005, such as its issuance of pesos to purchase U.S. dollar reserves, and stated that "the purpose of this was to enable the Republic to make an early (and unnecessary) payment to the International Monetary Fund to clear the indebtedness of that entity." (SPA 61).

The district court erred in relying on the BCRA's involvement in the Republic's payment to the IMF. The Republic's use of the BCRA as an agent in repaying the IMF does not warrant ignoring the BCRA's separate juridical status.

First, the Republic's decision to pay the IMF in preference to its other creditors was consistent with the long-standing policy of the United States and the other sovereign members of the IMF to recognize the preferred creditor status of the IMF. In order to protect the funds of its member states (including the funds invested by the United States), the IMF rightly expects to be paid even when other creditors are not. *See, e.g.*, International Monetary Fund, Financial Risk in the Fund and the Level of Precautionary Balances (Feb. 3, 2004), at 4 ("Member governments and other creditors have agreed to treat the Fund as a preferred creditor to help achieve its purposes. Preferred creditor status is fundamental to the Fund's financial responsibilities

and the Fund's financing mechanism as this means that members give priority to repayment of their obligations to the Fund over other creditors thus protecting the reserve assets that other members have placed in the custody of the Fund."); *see also* Lee C. Buchheit, *The Search for Intercreditor Parity*, 8 Law & Bus. Rev. of the Americas 73, 74 (2002) ("[T]he history of sovereign debt restructurings over the last twenty years confirms that certain classes of creditors have indeed been accorded de facto senior status . . . . The international financial institutions such as the [IMF], the World Bank, and the regional development banks are the best examples of such 'preferred' creditors.").

Second, the BCRA's involvement in the Republic's payment to the IMF was not unusual: central banks commonly perform payment functions for their governments, including central banks that are relatively independent from their governments. *See EM*, 473 F.3d at 485 (noting that IMF members are required to designate a fiscal agent for financial transactions with the IMF, and that the vast majority of members designate their respective central banks). Indeed, according to a May 2005 report, the IMF encouraged Argentina to repay its loans using its reserves held by the BCRA. (JA-VI: 120-21). According to the IMF staff, many other countries had repaid the IMF out of international reserves held by the debtor country's central bank. *Id.* Thus, the Republic's decision to use the BCRA to repay its debt to the IMF is not indicative of the type of extensive control that concerned the Supreme Court in *Bancec*, nor is it evidence of fraud and injustice. The involvement of the BCRA in repaying the IMF was consistent with the proper functioning of the IMF lending program, and should not have been considered

by the district court as a basis for an alter ego determination.*

---

* As noted above, the United States does not believe that it is necessary to reach the alter ego question because the disposition of this case is controlled by application of § 1611(b)(1). Thus, the United States focuses its objection to the district court's alter ego analysis on that court's reliance on the BCRA's involvement in repaying the IMF because of the strong U.S. interest in preserving the financial position of the IMF, and because, based on the United States' limited view of the factual record, it is clear that the district court erred in this regard. Assuming for purposes of argument, however, that "alter ego" is a proper framework for analysis when dealing with a separate juridical entity like a central bank that performs governmental functions, *cf.* Bancec, 462 U.S. at 633 n. 27, it also appears questionable whether other factual findings made by the district court could properly support an alter ego determination. In particular, the United States is not prepared to accept, as a blanket proposition, that a foreign state's involvement in the decision of its central bank to increase its U.S. dollar reserves, or the fact that a foreign central bank's U.S. dollar purchases are intended to serve the interests of the foreign state, are properly considered evidence of an alter ego relationship. (*Cf.* SPA 24-27, 30-31, 60-63). Nor does the United States necessarily believe that a central bank's payment of debt to creditors other than the IMF establishes an alter ego relationship (*cf.* SPA 62, 65), a question that may depend on the specific facts and circumstances. This type of conduct would not appear to evidence a foreign state's day-to-day control

over central bank operations. *See Bancec*, 462 U.S. at 629; *General Star National Insurance Co. v. Administratia Asigurarilor de Stat,* No. 18 MS 302, 2010 WL 1948580, at *10 (S.D.N.Y. May 12, 2010) (requiring a showing of day-to-day control). If the Court were to reach the alter ego issue despite our submission that § 1611(b)(1) bars the attachment, the case should be remanded to the district court for further proceedings on the alter ego issue in light of the substantial weight the district court erroneously placed on the BCRA's role in the IMF repayment, and to allow further consideration of mixed questions of law and fact concerning the additional factors just mentioned. At this time, it is sufficient to note that central banks ordinarily have a high degree of interaction with their parent foreign governments, and that courts should give significant deference to a foreign government's conduct vis-à-vis its central bank.

CONCLUSION

The judgment of the district court should be reversed.

Dated: New York, New York
November 3, 2010

Respectfully submitted,

PREET BHARARA,
United States Attorney for the Southern District of New York, Attorney for Defendant-Appellee.

JOHN D. CLOPPER,
BENJAMIN H. TORRANCE,
Assistant United States Attorneys, Of Counsel.

TONY WEST,
Assistant Attorney General

DOUGLAS N. LETTER,
SHARON SWINGLE,
Attorneys, Appellate Staff, Civil Division, Department of Justice

GEORGE W. MADISON,
General Counsel, Department of Treasury

HAROLD HONGJU KOH,
Legal Adviser, Department of State

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, there are 5968 words in this brief.

PREET BHARARA,
United States Attorney for the Southern District of New York

By: JOHN D. CLOPPER,
Assistant United States Attorney